referred to as evidence of its continuance to that period. But I think it will be difficult to maintain the position upon any principle of international law, that the belligerent may continue a blockading force at the port after it has not only ceased to be an enemy's, but has become a port of its own. It is not necessary that the belligerent should give notice of the capture of the town, in order to put in operation the municipal laws of the place against neutrals. The act is a public event of which foreign nations are bound to take notice, and conform their intercourse to the local laws. The same principle applies to the blockade, and the effect of the capture of the port upon it. The event is public and notorious, and the effect and consequences of the change in the state of war upon the blockading force well understood.

I have felt it a duty to state the grounds of my dissent in this case, not on account of the amount of property involved, though that is considerable, or from any particular interests connected with the case, but from a conviction that there is a tendency, on the part of the belligerent, to press the right of blockade beyond its proper limits, and thereby unwittingly aid in the establishment of rules that are often found inconvenient, and felt as a hardship, when, in the course of events, the belligerent has become a neutral. I think the application of the law of blockade, in the present case, is a step in that direction, and am, therefore, unwilling to give it my concurrence.

[See *infra*, p. 258, *The Venice;* a case, in some senses, suppletory or complemental to the present one.]

FREEBORN *v.* SMITH.

1. When Congress has passed an act admitting a Territory into the Union as a State, but omitting to provide, by such act, for the disposal of cases pending in this court on appeal or writ of error, it may constitutionally and properly pass a subsequent act making such provision for them.
2. This court will not hear, on writ of error, matters which are properly the subject of applications for new trial.

Statement of the case.

3. Parties cannot give private conversation or correspondence with each other to rebut evidence of partnership with a third person.

THIS was a writ of error to the Supreme Court of *Nevada Territory*.

Smith had obtained a judgment against Freeborn and Shelden in the Supreme Court of Nevada; Nevada being at the time a Territory only, not a State. To this judgment a writ of error went from this court, under the law organizing the Territory, and the record of the case was filed here, December Term, 1862. After the case was thus removed, the Territory of Nevada was admitted by act of Congress, March, 1864, into the Union as a State. The act admitting the Territory contained, however, no provision for the disposal of cases then pending in this court on writ of error or appeal from the Territorial courts. *Mr. Cope and Mr. Browning*, in behalf of *the defendants in error*, accordingly moved to dismiss the writ in this and other cases similarly situated, on the ground that the Territorial government having been extinguished by the formation of a State government in its stead, and the act of Congress which extinguished it having, in no way, saved the jurisdiction of the court as previously existing, nothing further could be done here. The Territorial judiciary, it was urged, had fallen with the government, of which it was part; and the jurisdiction of this court had ceased with the termination of the act conferring it. *Hunt* v. *Palao*,* and *Benner* v. *Porter*,† were relied on to show that the court had no power over cases thus situated.

It being suggested by *Mr. O'Connor and Mr. Carlisle on the other side*, or as interested in other cases from Nevada similarly situated, that a bill was now before Congress supplying the omissions of the act of March, 1864, the hearing of the motion for dismissal was suspended till it was seen what Congress might do. Congress finally acted, and on the 27th of February, 1865, passed "An Act providing for a District Court of the United States for the District of Nevada," &c.

* 4 Howard, 589. † 9 Id. 235.

Statement of the case.

The eighth section of this enacts,—

"That all cases of appeal or writ of error heretofore prosecuted and now pending in the Supreme Court of the United States, upon any record from the Supreme Court of the Territory of Nevada, may be heard and determined by the Supreme Court of the United States; and the mandate of execution or of further proceedings shall be directed by the Supreme Court of the United States to the District Court of the United States for the District of Nevada, or to the Supreme Court of the State of Nevada, as the nature of said appeal or writ of error may require; and each of these courts shall be the successor of the Supreme Court of Nevada Territory as to all such cases, with full power to hear and determine the same, and to award mesne or final process thereon."

The motion to dismiss the writ for want of jurisdiction was now renewed.

Assuming jurisdiction to exist, this case of *Smith* v. *Freeborn*, &c., was argued also on a question of merits. The judgment mentioned at the beginning of the case, which Smith had obtained against Freeborn and Shelden, he had obtained against them as secret surviving partners of a certain Shaw. One ground of the writ of error was that *no* evidence whatever had been offered of a partnership with Shaw between Freeborn *and* Shelden (a matter which was more or less patent on the record); and that judgment having gone against both (two jointly) and error as to one, the judgment would have to be reversed. A motion had been made and refused below for a new trial.

There was also another question of merits. To rebut the evidence of partnership, the defendants offered some letters between themselves and Shaw, and between themselves and one Eaton, an agent of theirs; which letters, though containing, as was urged, some admissions against their own interest, the court below refused to let go in evidence to disprove a partnership.

Its action on these two points was one matter argued, but the great question was that of jurisdiction, a matter affecting other cases as well as this.

Argument for the motion.

Messrs. Cope and Browning for the motion to dismiss, &c.:

1. As to the jurisdiction, our position is that *the act is a retrospective enactment interfering with vested rights.* Certainly it attempts to confer on this court jurisdiction to review judgments which, by law, at the time of its passage were final and absolute. The necessary result of maintaining it would be to disturb and impair these judgments, unsettle what had been previously settled, and compel the parties to litigate anew matters already definitively adjudicated. There is no higher evidence that rights have vested than a final judgment solemnly confirming them. Law is defined to be a rule of conduct; and to call an enactment which undertakes to deal with past transactions, and subject them to new requirements and conditions as tests of their legality, a rule of conduct, is to confound all rational ideas on the subject. *Ex post facto* laws are expressly prohibited by the Constitution, but the courts would hardly enforce enactments of this nature even in the absence of any constitutional prohibition; because, being retrospective, and providing for the punishment of acts not illegal when committed, they are not laws in the true sense of that term, and not, therefore, within the sphere of legislative authority. The principle is entirely applicable to civil causes, and prevents any injurious intermeddling with past transactions. Legislative power begins and ends with the power to enact laws, and in respect to the conduct of men in their dealings and obligations, and in the acquisition of property, no valid law can be enacted which undoes or unsettles that which was legally done or settled under a previous law.

The validity of enactments of this character has frequently been denied. In *Merrill* v. *Sherburne,** Woodbury, J., says: "Acts of the legislature which look back upon interests already settled or events which have already happened, are retrospective, and our Constitution has in direct terms prohibited them, because highly injurious, oppressive, and unjust. But perhaps their invalidity results no more from this

* 1 New Hampshire, 213.

express prohibition, than from the circumstance that in their nature and effect, they are not within the legitimate exercise of legislative power." After speaking of *ex post facto* laws, he adds: "Laws for the decision of civil causes made after the facts on which they operate, *ex jure post facto*, are alike retrospective, and rest on reasons alike fallacious." In *Bates* v. *Kimball*,* Aikens, J., says: "The principle meant to be laid down is that an act not expressly permitted by the Constitution, which impairs or takes away rights vested under pre-existing laws, is unjust, unauthorized, and void." In *Staniford* v. *Barry*,† Prentiss, J., in referring to the decision in *Bates* v. *Kimball*, and the reasoning on which it was based, says: "The case appears to have been maturely considered, and was decided on principles and authorities which are conclusive of the question. We have only to add, that the principles adopted have become settled constitutional law, and are universally recognized and acted upon as such, by all judicial tribunals in this country. They are found in the doctrines of learned civilians, and the decisions of able judges, without a single decision, or even opinion or dictum to the contrary. They not only grow out of the letter and spirit of the Constitution, but are founded in the very nature of a free government, and are absolutely essential to the preservation of civil liberty, and the equal and permanent security of rights." In *Lewis* v. *Webb*,‡ Mellen, C. J., lays it down as a settled rule, "that a law retrospective in its operation, acting on past transactions, and in its operation disturbing, impairing, defeating, or destroying vested rights, is void, and cannot and must not receive judicial sanction." In *McCabe* v. *Emerson*,§ Rogers, J., after stating that it could not be presumed that the legislature intended to give the act under consideration a retrospective effect, says: "But granting that intention to be clearly expressed, I have no hesitation in saying that the act is unconstitutional and void. The legislature has no power, as has been repeatedly held, to interfere with vested rights."

* 2 Chipman, 88.
† 1 Aikin, 314.
‡ 3 Greenleaf, 335.
§ 18 Pennsylvania State, 111.

Argument for the motion.

We do not question the validity of retrospective statutes that are purely remedial, that give a remedy without disturbing or impairing rights. Whenever they attempt to interfere with a right, however, the legislature has passed the bounds of its authority, and the acts are void.

The court is here asked to review a judgment on which the law has already pronounced its final sentence. The act of Congress just obtained, concedes that the judgment has become final, but declares that it shall not remain so, and deprives the parties of any benefit from it until the matters settled by it are again adjudicated. If it be possible for a right to attach itself to a judgment, it has done so here, and there could not be a plainer case of an attempt to destroy it by legislative action. It is unimportant, of course, that the court ever had jurisdiction; if it proceed at all, it must proceed under the jurisdiction conferred by the act, and not under that which it formerly had. The case stands as if the judgment had been rendered by a court of last resort.

2. In passing the act Congress attempted to exercise power judicial in its nature, and not legislative. If this is so, it will follow as a necessary conclusion that the act is void.

What distinguishes judicial from legislative power? It is that the one is creative and the other administrative; the one creates or enacts laws by which the community is to be governed, and the other administers those laws as between the members of which the community is composed. Those matters of which the courts assume jurisdiction, and particularly those appertaining to the trial and determination of causes, are clearly and necessarily the subjects of judicial power. Such matters include all of the proceedings in a cause from its commencement to its termination, and it is certain that within these limits no other than judicial power can be exercised. Filing a complaint, summoning and empannelling a jury, rendering a verdict or judgment, granting or refusing a new trial, taking an appeal or suing out a writ of error, are all acts pertaining to the jurisdiction of the courts, and within the operation of this power. They must be done in pursuance of some law prescribed by legislative

authority, but considered merely as acts done, or to be done, in the progress of a cause, a legislative body has no power or control over them, either to command the doing of them, or to set them aside when done. No one will deny that rendering a judgment is strictly a judicial act, and it is evident that the power exercised in rendering it must also be exercised in setting it aside, for the act of setting a judgment aside, like the judgment itself, is simply a proceeding in the cause. And so as to every act that may be done in a cause, from its inception to its close; it is merely a proceeding in the cause, and is purely judicial in its nature. There is no difference in this respect between one act or one proceeding in a cause and another, they are alike judicial in their nature, and exclusively the subjects of judicial power. If one such act may be done or undone by legislative authority, there is no reason why the same authority may not be employed to do or undo every act throughout the proceedings. The question ceases to be a question of power, and becomes one of discretion only.

In *Merrill* v. *Sherburne*, the question was as to the validity of a statute granting a new trial after final judgment, and in *Bates* v. *Kimball*, and *Lewis* v. *Webb*, as to the validity of statutes granting an appeal where the judgments had also become final. It was held, in all the cases, that the statutes were unconstitutional and void, that their effect was to take away the legal force of the judgments to which they applied, and that in respect to these judgments they amounted to orders or decrees, which the courts alone were competent to make. These cases were decided not only on reasoning the most conclusive, but on authorities of the highest respectability and weight.

The act of Congress undertakes to grant an appeal or review in certain cases, in which there was no right of review at the time of its passage. The cases had been prosecuted as far as they could be under the law as it then stood; and if they may be prosecuted farther now, it is because Congress has the power to open the judgments, and direct the matters in controversy to be tried anew. The act

operates as a judicial order in each of the cases to which it applies.

Moreover, how can Congress authorize this court to issue its mandate to a State court in a matter which is of State jurisdiction? It would be plainly unconstitutional to do so. Perturbations of our whole judicial system would arise; and no one could calculate the extent of the disaster.

II. Respecting merits. The case is here short and easy.

1. As to the first point, this court cannot review the evidence on which a jury found.

2. As to the second, there was no error in refusing to let parties make proof in their favor out of correspondence between one another, and between themselves and their agent.

Messrs. O'Connor and Carlisle, with brief of Mr. Billings, contra.

I. *As respects jurisdiction.*

1. Independently of the act of Congress of 27th February, 1865, how does the case stand?

The Territorial government is said to have been extinguished by the formation and establishment of a State government in its stead. Admitting this, does it necessarily follow that all acts performed by any department of the Territorial government down to the last moment of its existence, must, by the annihilation of their author, become irreversibly enforceable forever? We think not.

If a tribunal, hastily gotten up in one of the newly created Territories, has given a judgment involving millions, in utter violation of law, equity, reason, and conscience, must that judgment stand irreversible, establishing the right forever, merely because the court that gave it was in *articulo mortis* at the time, and expired shortly afterwards? Again we think not.

The Territorial government has been superseded, not by a direct declaration of the legislative will to that effect, but merely as a necessary consequence of a new government having arisen in its stead. The Territorial judiciary fell

Argument against the motion.

with the government of which it was a part; but the Supreme Court of the United States never was any part of the Territorial government. It did not cease to exist when the State of Nevada was admitted, nor did it lose its power, in fact or in law, to annul a definitive judgment of the Territorial court which was unlawful, and which, however unlawful, must, nevertheless, until reversed, form a bar to justice between the parties in any earthly tribunal.

It is said that no mandate can go to the Territorial court of Nevada announcing a reversal here because no such court exists. Granted; but is such a process indispensable to the existence of power here, or to the efficacy of this court's judgment in all courts and places? Surely not.

No further proceeding can be had in the Territorial courts by either plaintiffs or defendants; but the plaintiffs may bring a new action in the State courts. To such action the judgment, heretofore rendered in the now extinct courts of Nevada, would, indeed, be *primâ facie* a bar. But such bar would be at once raised, and every impediment to legal justice removed, if the plaintiffs should produce a record of this court showing that the judgment of the Territorial court was here reversed. It could not be said that the decision of this court was nugatory because it had failed to announce its reversal to the extinct tribunal whose judgment it reversed. "This reversal was not to depend on any act to be performed, or opinion to be given by the court below; but stood absolute by the judgment of this court."*

There is no repeal of the Territorial act. It remains a *law*, valid and operative for the purpose of giving efficiency and force to all things done under its authority. The assertion that it is superseded is only partly true. The Territorial government, with its departments, is, indeed, gone; but the power of vacating errors committed in those departments which, in a lawful and constitutional way, was vested in any still existing officers of the United States, is not necessarily superseded.

* Davis v. Packard, 8 Peters, 323; S. P. Webster v. Reid, 11 Howard, 457.

Argument against the motion.

We do not perceive any difficulty even in removing a judgment to this court after the admission of the State. The record remains a valid paper in the hands of an officer whose duties, except as custodian of the records, have ceased.* And it is settled that the writ of error to remove a record may go to the place where the record is lawfully deposited, and to the court or officer having lawful custody of it. There is no necessity that it should go to the tribunal which pronounced the judgment sought to be reversed.

We think it is not correct to say that the act creating Nevada Territory is repealed or abrogated. Nothing can be done under it which is inconsistent with the subsequent governmental action of the United States in admitting the State of Nevada; but this is the whole extent to which it has become inoperative. The jurisdiction of this court to reverse the judgments of the Territorial Supreme Court remains.

2. How does the case stand under the act of 27th February, 1865?

This act is in substantial conformity with former legislation of Congress, which has been passed upon and approved by this court. After the State of Florida was admitted into the Union on February 22d, 1847, an act was passed directing "that in all cases in which judgment or decrees have been rendered in the" late Territorial courts of Florida, "and from which writs of error have been sued out or appeals have been taken to the Supreme Court of the United States, the said Supreme Court shall be and is hereby authorized to hear and determine the same."† Under that act, this court exercised appellate jurisdiction in *Benner* v. *Porter*.‡ By a supplemental act, passed February 22d, 1848,§ it was enacted that the provisions of said act of 1847, "so far as may be, shall be, and they hereby are, made applicable to all cases which may be pending in the Supreme or other superior court of and for any Territory of the United States, which

* Benner *v.* Porter, 9 Howard, 246.
† 9 Howard, 246.
† 9 Stat. at Large, 129, § 8.
§ 9 Stat. at Large, 212, § 2

Argument against the motion.

may hereafter be admitted as a State into the Union, at the time of its admission, and to all cases in which judgments or decrees shall have been rendered in such Supreme or superior court at the time of such admission, *and not previously removed by writ of error or appeal.*" The first section of this same act of 1848 applied in terms the remedy thus contemplated to the like cases in the Territorial courts of Iowa. Under this first section of the act of 1848, this court took cognizance of a writ of error in an ordinary land case, not of peculiar Federal cognizance, issued after Iowa had been admitted as a State, and thereupon reversed the judgment of the Territorial court of Iowa in *Webster* v. *Reid.**

As a palliative of the consequences plainly resulting from the doctrines of the defendant, it is intimated that Congress might have done all that was necessary in the enabling act under which Nevada came in as a State; but having let slip that opportunity, no remedy can now be applied. But

1. This assumes the much debated and very disputable position that Congress, when admitting a State into the Union, may impose special conditions upon that favor, and place her in a position inferior to that of her elder sisters.

2. It also assumes that, in retaining or exercising authority to cause a review of judgments pronounced by its own judges in its own courts, the Federal Government would exercise a jurisdiction over matters and questions properly of State cognizance. Such is not the fact. It only reverses, if erroneous, and approves, if right, the acts of its own officers.

The authorities to the contrary of the doctrine thus set up are numerous. It is neither an exercise of judicial power nor an invasion of vested rights. It is merely a legislative regulation of judicial practice. There is no such thing as a vested right in a wrong-doer to evade the exercise of judicial power.† *Bull* v. *Calder*‡ is an early leading case. The

* 11 Howard, 437.

† Watkins *v.* Holman, 16 Peters, 60, 61; Schenley *v.* Commonwealth, 36 Pennsylvania State, 29; Rich *v.* Flanders, 39 New Hampshire, 317, 320–325

‡ 3 Dallas, 386.

Reply for the motion.

United States v. *Sampeyrac*,* is a later one. It was held in this last case that Congress might confer jurisdiction, and at the same time might ratify and legitimate an action already commenced in a court which, until the act in question, had no jurisdiction of the matter. The doctrine of vested rights never restrains a legislature from advancing justice or remedying wrongs. It is intended to prevent oppression and injustice, not to afford them an impunity.

II. *As to merits.*

1. Is it shown upon the record that Freeborn *and* Shelden were partners with Shaw? Our objection is on this point, that there was absolutely *no* evidence *tending* to show that such a partnership existed. The court ought not to have submitted to the jury the question of fact whether such partnership existed. It follows that if the court can correct the error below upon the record, the judgment must be reversed. Because it is familiar law that where there has been judgment against *two* (jointly), and there is error as to *one*, the judgment must be reversed.

2. The remaining point arises upon the rejection of certain evidence offered by the defendants, to wit, letters and telegraphic messages from Shaw (the real debtor) to the parties charged as partners in this suit, and now plaintiffs in error. These letters contained admissions against interest, and should have been received.

Reply: Two cases in this court are cited as militating against the general principles we assert: *Calder* v. *Bull*† and the *United States* v. *Sampeyrac*.‡ But neither really does so.

Calder v. *Bull* arose on a statute of Connecticut allowing an appeal from a judgment rendered by a probate court of that State, the time for appealing under the law as it stood previously having expired. The statute was passed prior to the adoption of a State constitution, and it was shown to

* 7 Peters, 222. † 3 Dallas, 386. ‡ 7 Peters, 222.

have been the custom of the legislature from a very early period to enact laws of this nature, and exercise a general control over the judiciary in respect to new trials and appeals. The grounds urged against the statute were that it was a judicial and not a legislative act, and that it contravened the clause of the Federal Constitution prohibiting the passage of *ex post facto* laws. The decision of the court was in favor of its validity, but the judges wrote separate opinions, and assigned different reasons for their conclusion. As to the first ground, some of them held that it was immaterial, there being no provision in the Constitution preventing the legislature of a State from exercising judicial powers. Others held that whether the statute be regarded as judicial or legislative, it was justified by the ancient and uniform practice of the legislature, and should be maintained. It was unanimously agreed that the prohibition referred to only applied to criminal enactments, and that a State statute affecting civil rights merely was not within it. This was the whole case, and the decision certainly has no effect upon the principle contended for here.

The case of the *United States* v. *Sampeyrac* brought in question the validity of an act of Congress extending the provisions of a previous act, so as to enable the Territorial courts of Arkansas to entertain bills of review on the part of the United States in cases of forgery and fraud. No interference with vested rights was contemplated by the act, the effect of which was simply to invest certain tribunals with equitable powers not possessed by them before, to be exercised in a class of cases over which the ordinary jurisdiction of courts of equity has always extended. It is a part of the general jurisdiction of these courts to investigate matters of fraud, and grant relief to the parties injured by them; and it was, of course, competent for Congress to confer this jurisdiction on the courts of Arkansas. It did this, and nothing more, leaving those courts to proceed in accordance with the settled principles governing courts of equity in such cases. It was on this ground mainly that the court sustained the act, holding in respect to the merits of

the case that the judgment in question was fraudulent, and that no rights had vested under it. The decision, therefore, is not in point.

It may be that, in *Benner* v. *Porter*,* this court assumed jurisdiction of an appeal given by an act of this nature; but it seems to have done so without argument, and without any consideration of the question of the power of Congress to pass the act. Under such circumstances, the case should not be regarded as conclusive; and the question should be treated as an open one, and determined upon its merits.

Mr. Justice GRIER delivered the opinion of the court.

The most important question of this case is that of jurisdiction.

It is objected to the act of 27th February, just passed, that it is ineffectual for the purpose intended by it; that it is a retrospective act interfering directly with vested rights that the result of maintaining it would be to disturb and impair judgments which, at the time of its passage, were final and absolute; that the powers of Congress are strictly legislative, and this is an exercise of judicial power, which Congress is not competent to exercise. But we are of opinion that these objections are not well founded.

The extinction of the Territorial government, and conversion of the Territory into a State under our peculiar institutions, necessarily produce some anomalous results and questions which cannot be solved by precedents from without.

It cannot be disputed that Congress has the exclusive power of legislation in and over the Territories, and, consequently, that the Supreme Court has appellate jurisdiction over the courts established therein, "under such regulations as Congress may make."† In the case of *Benner* v. *Porter*,‡ it is said: "The Territorial courts were the courts of the General Government, and the records in the custody of their clerks were the records of that Government, and it would seem to follow necessarily from the premises that no one

* 9 Howard, 235. † Constitution, Art. 3. ‡ 9 Howard, 235.

could legally take possession or custody of the same without the assent, express or implied, of Congress." The act of 22d of February, 1848, chapter 12, which provides for cases pending in the Supreme or superior court of any Territory thereafter admitted as a State, made no provision for cases pending in this court on writ of error or appeal from a Territorial court. In the case just mentioned, we have decided that it required the concurrent legislation of Congress and the State legislature, in cases of appellate State jurisdiction, to transfer such cases from the old to the new government.

The act of Congress admitting the State of Nevada omitted to make such provision, although the Constitution of Nevada had provided for their reception. Now, it has not been and cannot be denied, that if the provisions of the act now under consideration had been inserted in that act, the jurisdiction of this court to decide this case could not have been questioned.

By this omission, cases like the present were left in a very anomalous situation. The State could not, *proprio vigore*, transfer to its courts the jurisdiction of a case whose record was removed to this court, without the concurrent action of Congress. Until such action was taken, the case was suspended, and the parties left to renew their litigation in the State tribunal. What good reason can be given why Congress should not remove the impediment which suspended the remedy in this case between two tribunals, neither of which could afford relief? What obstacle was in the way of legislation to supply the omission to make provision for such cases in the original act? If it comes within the category of retrospective legislation, as has been argued, we find nothing in the Constitution limiting the power of Congress to amend or correct omissions in previous acts. It is well settled that where there is no direct constitutional prohibition, a State may pass retrospective laws, such as, in their operation, may affect suits pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of

legal proceedings.* The passage of the act now in question was absolutely necessary to remove an impediment in the way of any legal proceeding in the case.

The omission to provide for this accidental impediment to the action of this court, did not necessarily amount to the affirmance of the judgment, and it is hard to perceive what vested right the defendant in error had in having this case suspended between two tribunals, neither of which could take jurisdiction of it; or the value of such a right, if he was vested with it. If either party could be said to have a vested right, it was plaintiff in error, who had legally brought his case to this court for review, and whose remedy had been suspended by an accident, or circumstance, over which he had no control. If the judgment below was erroneous, the plaintiff in error had a moral right at least to have it set aside, and the defendant is only claiming a vested right in a wrong judgment. "The truth is," says Chief Justice Parker, in *Foster* v. *Essex Bank*,† "there is no such thing as a vested right to do wrong, and the legislature which, in its acts, not expressly authorized by the Constitution, limits itself to correcting mistakes and to providing remedies for the furtherance of justice, cannot be charged with violating its duty, or exceeding its authority." Such acts are of a remedial character, and are the peculiar subjects of legislation. They are not liable to the imputation of being assumptions of judicial power.

The constitutional difficulty attempted to be raised on the argument, that Congress cannot authorize this court to issue a mandate to a State court, in a mere matter of State jurisdiction, is factitious and imaginary. It is founded on the assumption, that all the questions which we have heretofore decided are contrary to law, and is but a repetition of the former objections which have been overruled by the court under another form of expression. For if it be true, as we

* See Hepburn *v.* Curts, 7 Watts, 300, and Shenly *v.* Commor wealth, 36 Pennsylvania State, 57.

† 16 Massachusetts, 245; and see Rich *v.* Flanders, 39 New Hampshire, 325.

have shown, that Congress alone had the power of disposing of the Territorial records, and providing for the further remedy in the newly organized courts—if it requires the concurrent legislation of both Congress and the State to dispose of the cases in the peculiar predicament in which this case was heard—if Congress had, as we have shown, the power to remove the impediments to its decision, and remit it to a State court authorized by the constitution of the State to take cognizance of it, they must necessarily regulate the conditions of its removal, so that the parties may have their just remedy respectively. If a State tribunal could not take possession of the record of a court removed legally to this court, nor exercise jurisdiction in the case without authority of Congress (as we have decided), without the legislation of Congress, they must necessarily accept and exercise it subject to the conditions imposed by the act which authorizes them to receive the record. This court would have the same right to issue its mandate as in cases where we have jurisdiction over the decisions of the State courts, under the 25th section of the Judiciary Act, and for the same reasons,—because we have jurisdiction to hear and decide the case.

II. Having disposed of the question of jurisdiction, the case presents no difficulty.

As to the case made on the motion for a new trial: our decision has always been, that the granting or refusing a new trial is a matter of discretion with the court below, which we cannot review on writ of error.

The single bill of exceptions in the case is to the refusal of the court to receive certain letters in evidence. The defendants were charged to have been partners of one George N. Shaw, or to have held themselves out to the public as such. This was the only issue in the case. To rebut the plaintiffs' proof, the defendants offered a correspondence between themselves, and some letters to them by one Eaton, their agent. It is hard to perceive on what grounds the parties should give their private conversations or correspondence with one another or their agent to establish their own case, or show that they had not held themselves out to the

public as partners of the deceased. Let judgment of affirmance be entered in the case, and a statement of this decision be certified to the Supreme Court of Nevada.*

AFFIRMANCE AND CERTIFICATE ACCORDINGLY.

SHEETS v. SELDEN'S LESSEE.

1. When a deed is executed on behalf of a State by a public officer duly authorized, and this fact appears upon the face of the instrument, it is the deed of the State, notwithstanding the officer may be described as one of the parties, and may have affixed his individual name and seal. In such case the State alone is bound by the deed, and can alone claim its benefits.

   Accordingly, where the legislature of Indiana passed two acts, one authorizing the Governor, and the other the Governor and Auditor of the State to sell certain property of the State, and to execute a deed of the same to the purchaser on behalf of and in the name of the State, and such property being sold, the Governor and Auditor executed to the purchaser a deed, naming themselves as parties of the first part, but referring therein to the acts of the legislature authorizing the sale, and to a joint resolution approving the same, and declaring that, by virtue of the power vested in them by the acts and joint resolution, they conveyed the property sold, "being all the right, title, interest, claim and demand which the State held or possessed," such deed was sufficient to pass the title of the State.

2. Land will often pass without any specific designation of it in the conveyance as land. Everything essential to the beneficial use and enjoyment of the property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing by the conveyance.

   Accordingly, where the conveyance was of a division or branch of a canal, "including its *banks*, *margins*, *tow-paths*, *side-cuts*, *feeders*, *basins*, *right of way*, *dams*, *water-power*, *structures*, and all the appurtenances thereunto belonging," certain adjoining parcels of land belonging to the grantor which were necessary to the use of the canal and water-power, and were used with it at the time, but which could not be included in any of the terms above, in Italics, passed by the conveyance.

3. At the common law the grantee of a reversion could not enter or bring ejectment for breach of the covenants of a lease; and the statute of 32 Henry VIII, giving the right of entry and of action to such grantee, is confined to leases under seal.

---

* See Webster *v.* Reid, 11 Howard, 461.